

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
Plaintiff,  
vs.  
MOTOROLA, INC., et al.,  
Defendants.

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MOTOROLA MOBILITY LLC, et al.,  
Plaintiffs,  
vs.  
MICROSOFT CORPORATION,  
Defendants.

Case No. C10-1823-JLR

DECLARATION OF DAVID  
KILLOUGH IN SUPPORT OF  
MICROSOFT'S OPPOSITION TO  
MOTOROLA'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

I, David Killough, hereby declare as follows:

1. I am currently employed by Microsoft Corporation ("Microsoft") as an Assistant General Counsel. In this capacity, I am responsible for the supervision of a subset of the patent-related litigation in which Microsoft is involved, including the above-captioned matter. I have personal knowledge of the facts stated herein.

2. As part of my duties at Microsoft as an Assistant General Counsel, and prior to that as a Senior Attorney, I am - and have been since litigation was initiated between Microsoft and Motorola in 2010 – primarily responsible for the day-to-day management of the patent-related litigation between Microsoft and Motorola, including but not limited to the following cases: (i) the above-captioned case; (ii) *In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, ITC Investigation No. 337-TA-752 (“ITC 752”) and the related district court case *Motorola Mobility, Inc. and General Instrument Corporation v. Microsoft Corporation*, Case No. 3:10-cv-700, (W.D. Wisc.); (iii) litigation filed by Motorola in Germany;<sup>1</sup> and (iv) litigation filed by Motorola in the Western District of Wisconsin, *Motorola Mobility, Inc. and General Instrument Corporation v. Microsoft Corporation*, Case No. 3:10-cv-699, which case was subsequently transferred to this Court and consolidated with the above-captioned case.

3. In connection with my day-to-day management of these cases, I have supervised and am familiar with the work done by the following law firms: Sidley Austin LLP (“Sidley”), Calfo Harrigan Leyh & Eakes LLP, Boehmert & Boehmert, Freshfields Bruckhaus Deringer, and Klarquist Sparkman LLP. I am the person primarily responsible for reviewing the billings submitted to Microsoft by these law firms and for authorizing payment.

4. Microsoft is seeking to recover as damages in this action the attorneys’ fees it incurred as a result of Motorola’s breach of contract – *i.e.*, attorney’s fees and costs incurred as a result of Motorola’s assertion of its standard-essential patents (“SEPs”). This includes fees and costs incurred in connection with the German litigation, ITC 752 and the related district court action, and Case No. 699 originally filed in the Western District of Wisconsin. In

<sup>1</sup> This German litigation includes the following four actions filed by Motorola: *General Instrument Corporation v. Microsoft Deutschland GmbH*, Case No. 2 O 240/11; *General Instrument Corporation v. Microsoft Deutschland GmbH*, Case No. 2 O 373/11; *General Instrument Corporation v. Microsoft Corporation and Microsoft Ireland Operations Ltd.*, Case No. 2 O 376/11; and *General Instrument Corporation v. Microsoft Ireland Operations Ltd.*, Case No. 2 O 387/11 (collectively, the “German litigation”).

1 addition, Microsoft seeks to recover fees and costs associated with this action to the extent they  
 2 relate to Microsoft's motion for an "anti-suit" injunction (and related Ninth Circuit appeal),  
 3 and to Motorola's claims relating to the '374, '375 and '376 H.264 patents, which claims were  
 4 originally filed as Case No. 699 in the Western District of Wisconsin and subsequently  
 5 transferred to this Court and consolidated with this action.

6 5. In ITC 752, Motorola asserted five patents - four of which were asserted by  
 7 Motorola as SEPs (two allegedly relating to H.264 technology in Microsoft products – the '094  
 8 and the '596, and two allegedly relating to 802.11 or WiFi technology in Microsoft products –  
 9 the '712 and the '571), and a fifth that was not asserted as an SEP. Because, as a result, certain  
 10 time entries on Sidley's invoices in connection with ITC 752 relate to both Motorola SEPs and  
 11 non-SEPs, Microsoft has had these fees and costs allocated so that Microsoft seeks to recover  
 12 only the portion attributable to the SEPs. I dictated the methodology for assigning the  
 13 allocation percentages, and that methodology was executed by Sidley by identifying the time  
 14 entries subject to allocation through color coding on certain invoices, which were produced  
 15 with Bates numbers with an "A" suffix.

16 6. Based on my supervision of Sidley's work on ITC 752 and the other cases and  
 17 my responsibility for day-to-day case management, as well as my review of the Sidley  
 18 invoices, I am generally aware that specific attorneys had primary responsibility for issues  
 19 relating to Motorola's 802.11 patents and others to Motorola's H.264 patents.

20 7. Based on the identities of the timekeepers and time billing descriptions, I am  
 21 able to identify from Sidley invoices certain fees and expenses that Microsoft incurred in  
 22 connection with its defense of Motorola's 802.11 patents, and certain fees and expenses that  
 23 Microsoft incurred in connection with its defense of Motorola's H.264 patents.

24 8. Attached as Exhibit A to my declaration is a Sidley invoice dated February 28,  
 25 2011. I have identified at least certain time entries of the following Sidley attorneys on the

1 dates listed below as being related to defense of Motorola's 802.11 patents (the '712 and the  
2 '571) :

3 Kevin Wheeler – 1/6/11, 1/12/11, 1/15/11, 1/16/11 and 1/31/11

4 Brian Johnson – 1/7/11, 1/9/11, 1/10/11, 1/11/11, 1/25/11

5 Nabeel Khan – 1/12/11, 1/14/11

6 Tung Nguyen – 1/4/11, 1/5/11, 1/11/11, 1/13/11, 1/14/11, 1/28/11, 1/29/11, 1/30/11,  
7 1/31/11

8 Dale Nixon – 1/3/11

9 9. Similarly, I have identified at least the time entries of the following Sidley  
10 attorneys on the dates listed below as being related to defense of Motorola's H.264 patents (the  
11 '094 and the '596):

12 Doug Lewis – 1/3/11, 1/4/11, 1/5/11, 1/7/11, 1/11/11, 1/31/11

13 Herman Webley – 1/7/11, 1/10/11, 1/11/11, 1/13/11, 1/14/11, 1/16/11, 1/18/11,  
14 1/19/11, 1/26/11

15 10. I am similarly able to identify time entries related to work performed in defense  
16 of Motorola's 802.11 patents and time entries related to work performed in defense of  
17 Motorola's H.264 patents on other Sidley invoices.

18 I declare under penalty of perjury under the laws of the United States of America that  
19 the foregoing is true and correct.

20 DATED this 12th day of July, 2013 in Seattle, Washington.

21 s/ David Killough  
22 DAVID KILLOUGH

**CERTIFICATE OF SERVICE**

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 12th day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 12th day of July, 2013.

s/ Florine Fujita

FLORINE FUJITA